No. 80-902

SUPREME COURT, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant,

v.

NEW YORK COURT OF APPEALS,

Appellee.

On Appeal From the Court of Appeals of The State of New York

MOTION TO DISMISS

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State of New York
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Questions Presented

1. Does an applicant to the highest State Court for waiver of an eligibility requirement governing admission of out-of-State attorneys have a direct appeal to this Court from denial of such application, notwithstanding that he has not pursued any remedies available to him within the State court system; and is the denial of such application a "final judgment" of the highest court within the meaning of 28 USC § 1257?

2. Since the determination from which the appellant purports to appeal was issued on July 14, 1980, was he required to commence this appeal within 90 days of that date pursuant to 28 USC § 2101(c) and Rule 11.2 of this Court?

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State Law Involved and the Nature of the Case

Appellant seeks to bring before this Court for review the law in New York State by which attorneys admitted to practice in other jurisdictions may be admitted to practice in New York State without further examination.* Appellant notes that State laws which require residency as a condition for admission to practice have been criticized in recent years. Indeed, the New York State Court of Appeals has struck down the requirement of residency in New York (*Gordon v. Committee on Character and Fitness*, 48 NY2d 266 [1980]).** The rule involved in this case, however, does not require residency in the State of New York as a condition to admission, but rather considers actual experience in the practice of law in another jurisdiction in determining whether or not an applicant may be admitted in New York without examination.

We cannot agree, therefore, with appellant's view of the regulation he seeks to challenge. However, we submit that the challenge is not properly before this Court in any event. The application which was denied in this case requested that the Court of Appeals either certify that appellant had sufficient experience in the practice of law to justify admission without examination, or waive the rules by which such experience is ordinarily measured in the interest of justice. Such an application is not a judicial proceeding and did not give rise to an adjudicative order of the Court of Appeals. This appellant seeks authority to bring an original proceeding in the United States Supreme Court to challenge a New York State administrative regulation. Of course, no such original jurisdiction is contemplated by the United States Code or the Rules of this Court.

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*The rule in question is 22 NYCRR § 520.7 promulgated by the New York State Court of Appeals. The appellant contends, and appellee agrees, that this regulation constitutes the law of the State of New York for purposes of 28 USC § 1257. Copies of this section and section 520.10 are provided in the appendix to this brief (A-30; page references preceded by the letter "A" are to the appendix).

**It should be noted that State judicial review was sought and granted in that case after final denial of admission by the Appellate Division of New York Supreme Court (see p , below; see also *Jensen v Murphy*, USDC Maryland, 11/13/80; US Law Week 49 LW 2338, 11/25/80.

On the other hand, appellant has no less than three lawful avenues open to him by which to obtain judicial review in the State courts and make the contention he seeks to present herein: a proceeding pursuant to New York Civil Practice Law and Rules (CPLR), Art 78; a declaratory judgment action pursuant to CPLR, § 3001 wherein he could most appropriately challenge the constitutionality of the regulation; and an application for admission to practice made to the Appellate Division of New York State Supreme Court pursuant to New York Judiciary Law, § 90, from which an appeal could be taken to the Court of Appeals. No judicial review of appellee's administrative determination has been sought by the appellant under State court procedures available to him. This "appeal" is therefore decidedly premature.

Moreover, the application denied in this case was made June 30, 1980 (A-5) and denied July 14, 1980 (A-4). An appeal to this Court must be commenced by the filing of a notice of appeal within 90 days after the denial (October 13, 1980). Appellant contends only that the notice of appeal in this case was filed November 26, 1980; thus he appears to assume without arguing that by writing on August 14, 1980 (appellant's appendix p 3a) to the Clerk of the Court of Appeals, he was able to extend the period in which an appeal must be taken. Apparently, appellant would measure the 90-day period from the date the Clerk of the Court of Appeals replied to his letter, September 4, 1980 (appellant's appendix p 1a). This exchange of correspondence did not amount to an application for reconsideration of the original denial (U.S. Supreme Court, Rule 11.3) and therefore did not extend the limitation of time otherwise applicable. This "appeal" has not been timely commenced.

Facts

The appellant is an attorney admitted to practice in Pennsylvania and Arizona who seeks admission to practice in New York State. There appears to be no dispute that appellant is free to apply for such admission after taking and passing the New York State Bar Examination. 22 NYCRR § 520.7, however, authorizes the admission without examination of attorneys who are admitted in

another qualifying jurisdiction and have continuously and actually practiced law in such jurisdiction for a period of five years or more.

This regulation was promulgated by the New York State Court of Appeals. In addition to its judicial functions (New York Constitution, Art VI, § 3), the Legislature has delegated to the Court of Appeals (NY Judiciary Law, § 53) the authority to promulgate regulations concerning admission to practice law in the State of New York. Under the regulations so promulgated and Judiciary Law § 90, the function of reviewing and admitting candidates is performed primarily by the New York State Board of Law Examiners and the Appellate Divisions of the New York Supreme Court, which are the intermediate appellate courts. Two functions are retained by the Court of Appeals, the highest court, under these regulations. Under 22 NYCRR § 520.10 the Court of Appeals may "vary the application of or waive any provision of these rules where strict compliance will cause undue hardship on the applicant." Under 22 NYCRR § 520.7 (2[d]) the Court of Appeals may certify that a combination of experience satisfies the requirement of five years of experience for admission without examination.

It should be noted that the application for admission to the bar is made to, and admission is conferred by, an Appellate Division (New York Judiciary Law § 90). The power of the Court of Appeals is only to certify that certain of the standards for admission have been met. Thus the Court of Appeals (appellee) was without power to admit this applicant. There is no indication on the record that he has in fact applied for admission to practice, much less that such an application has been denied.

Appellant applied under 22 NYCRR 520.7 and 520.10 for waiver of the requirement to take the New York State Bar Examination (A-5). The application was denied (A-4).

ARGUMENT

The Determination from which this appeal is taken was not the final judicial determination of the New York State Court of Appeals and is, therefore, premature. Furthermore, this appeal was not taken within 90 days after the determination complained of, as required by 28 USC 2101.

By attempting to appeal directly to this Court from an administrative ruling, apellant has not only neglected legal remedies available to him in State court, he has also deprived appellee and this Court of a meaningful record on which to base consideration of the case. The appendix to apellant's jurisdictional statement consists of a collection of documents, legal argument, and correspondence, which apparently is not held out as the record on appeal. Appellee, of course, objects to the inclusion, among documents this Court is requested to consider, of purported excerpts from a memorandum of law (Jurisdictional Statement 12a-15a) and correspondence between appellant and the office of the Clerk of the New York Court of Appeals (1a-3a).*

This "record" accurately reflects the failure of appellant to pursue his available judicial remedies in the State courts. It is, thus, appropriate that 28 USC 1257 applies in this case. From the first sentence of that section it is plain that Congress did not contemplate that this Court would take jurisdiction over State court matters which had not run the gamut of the State judicial process: a process which, in the present case, has not even begun. As we have indicated, New York State law permits this appellant to seek judicial review of the determination to which he objects; it also permits him to complete his application for admission and, if denied, seek judicial review in the Court of Appeals.

A. **The denial from which this appeal is taken is not the final judgment of the highest Court in New York State, as required by 28 USC 1257.**

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*Appellant also omits from his appendix affidavits he submitted in support of his application, and which would presumably be a part of the record if appeal were to be permitted. Appended hereto are copies of all papers received and considered by the Court of Appeals in this matter.

The New York Civil Practice Law and Rules (Art 78) provides for judicial review of determination made by any governmental body or officer. A "body or officer" (CPLR § 7802[a]) "includes every court, tribunal, board, corporation, officer * * *". While there is some early authority in New York that the admission of attorneys is a judicial function (In *re Cooper*, 22 NY 67 [1860]), it clearly does not affect the present application, which does not seek admission to practice. Rather, it seeks waiver of certain rules of the Court of Appeals governing admission to practice, as they may apply if and when this applicant applies for admission. The Court was acting here in its administrative rather than its judicial capacity.

New York State Constitution, Art VI (§§ 2-3) continues the Court of Appeals as the highest judicial Court in the State. It is comprised of seven judges of whom five constitute a quorum. Four judges must concur in any result. In contrast, the function performed by the Court of Appeals in the present case is delegated to it by the Legislature (New York Judiciary Law, § 53), rather than the Constitution. The purported decision in this case was simply a letter from the clerk of the Court advising appellant that his application had been denied.

That the Court of Appeals performs both judicial and administrative functions in New York is well established. New York State Constitution Art VI § 28, and Judiciary Law Art 7-A give the chief judge and the Court a substantial role in the administration of the State court system. Civil Practice Law and Rules, § 1026 recognizes that this administrative role may give rise to litigation in the inferior courts, for it provides that the party to be named in such cases is the Chief Administrator of the Courts, rather than the Court of Appeals or any of its judges.

Thus the limitation on this Court's jurisdiction imposed by the first sentence of 28 USC 1257 dictates that this matter is not yet ripe for review by this Court. The legal question sought to be presented by the appellant has not yet been passed on by any New York Court, much less the highest Court of the State. A review of his application (A-5) shows that the constitutionality of the rule in question, which he purports to raise in this Court, was not even raised in the State

Court. There, he sought not a review of the validity of the rules applicable to his admission, but rather a review of his own qualifications in relation to those rules.

Not only is judicial review available and appropriate under Civil Practice Law and Rules, Article 78, which provides for challenges to administrative action, but also, to the extent that appellant presents a challenge to the validity of State statute or regulation, an action for declaratory judgment is available under CPLR § 3001. There can be doubt that the full measure of relief sought is avaiable in a declaratory judgment action (CPLR § 3017[b]). By either of these two means (or possiby even a combination of them; *Altona Citizens Committee v. Town of Altona,* 77 AD2d 956, [3d Dept, 1980]) a full judicial hearing and proper appellate record and review would be made available to appellant and this Court.

Nor would it be futile for this appellant to seek judicial review in New York of the rules governing admission to practice. New York Courts, including appellee, have been responsive to developments in the application of State and Federal constitutional requirements to the regulation of the practice of law. As noted above, the New York Court of Appeals recently struck down a residency requirement for admission to the Bar (*Matter of Gordon, supra;* see also, *Matter of Lofsof,* 34 NY2d 952 [1974]; *Matter of Pirie,* 64 AD2d 110 [1st Dept, 1978]).

These cases are especially noteworthy for the legal context in which they were considered. In each case, the applicants, instead of seeking to bypass State admission procedures, went forward with their applications for admission. The granting or denial of admission on the basis of the admission standards to which they objected gave rise to an actual judicial evaluation of the applications and the law governing them. Had they found it necessary to invoke the jurisdiction of this Court, those applicants would have had no difficulty in showing that the State Court decision on review was the final judicial one (rather than a preliminary administrative determination) (see also, 28 USC 1257 [1]; *Hanson v. Denckla,* 337 US 235, 244.)

B. **This appeal is barred by the time limitations of 28 USC 2101.**

It is axiomatic that a party cannot revive the time in which to seek review by his own self-serving reapplication to the lower tribunal (see, e.g., *FTC v. Minneapolis-Honeywell Co.*, 344 US 206, 210-11 [1952]). To the extent that there has been any final determination of appellant's rights, it occurred on July 14, 1980 (A-5). Appellant's letter requesting clarification (Jurisdictional Statement, p la) did succeed in provoking an answering letter from the Clerk of the Court (3a) but the Clerk restated the original determination. There is no provision or principle of New York law which would entitle appellant to reconsideration of the original determination. He was not entitled to and did not revive his petition on August 14, 1980. The last paragraph of his letter of that date (3a) is clearly aimed at Rule 11.3 of this Court (which extends the time in which to appeal) rather than to any legitimate expectation of rehearing.

The 90 days within which appellant could appeal expired October 13, 1980. Any doubt in this regard arises not from any lack of finality in appellee's action, but from the appellant's choice to treat as a judicial order what was in fact a less formal administrative determination.*

It should be noted that the effect of applying this time limitation is procedural only and does not deprive the appellant of the opportunity to press his legal claim, should he be so advised. As noted above, the conventional procedure of applying to the Appellate Division for admission apparently is still open to him (even if Article 78 review of the present determination is barred by the applicable four month statute of limitations). That Court may choose to admit him, and if not, the Court of Appeals may reverse or modify the order of the Appellate Division. At both levels, appellant would have the opportunity to present the arguments he seeks to present here; and the courts of New York would have the opportunity to consider them. Appeal to this Court would then be available in the unlikely event that the constitutional rights of the applicant are flouted by the New York courts.

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*Appellee herein argues that the determination was non-judicial, but not non-final.

CONCLUSION

The Purported Appeal should be dismissed.

Dated: Albany, New York
January, 1981

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee

SHIRLEY ADELSON SIEGEL
Solicitor General

FRANKLIN K. BRESELOR
Assistant Attorney General

Of Counsel

APPENDIX

NEW YORK COURT OF APPEALS

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In the Matter of the Application
for Admission to the Bar of
FRANCIS GERARD FLEMING

NOTICE OF APPEAL

----------x

TO: THE NEW YORK COURT OF APPEALS

PLEASE TAKE NOTICE that Francis Gerard Fleming, (hereafter appellant) hereby appeals the decision of the New York Court of Appeals denying his "Application for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination" to the United States Supreme Court.

This appeal is taken pursuant to 28 U.S.C. §1257(2). No formal judgment or written order has been entered and filed in this matter by the New York Court of Appeals despite appellant's written request for judgment or order; however, the decision appealed from is contained in the letter of the Clerk of the Court to appellant dated July 14, 1980 preliminarily denying appellant's application, and the letter of the Clerk of the Court to appellant dated September 4, 1980 finally denying appellant's application upon his request for clarification and reconsideration.

Dated: November 25, 1980

Respectfully submitted,

KREINDLER & KREINDLER

By: _____
LEE S. KREINDLER
PAUL S. EDELMAN

_____
FRANCIS GERARD FLEMING
99 Park Avenue
New York, New York

CERTIFICATE OF SERVICE

PAUL S. EDELMAN, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that a copy of this Notice of Appeal and the attached Certificate or Service was deposited November 25, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following persons:

Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Honorable Lawrence H. Cooke
Court of Appeals Chambers
County Courthouse
Monticello, New York 12701

Honorable Matthew J. Jasen
Erie County Hall
Buffalo, New York 14202

Honorable Domenick L. Gabrielli
Court of Appeals Chambers
Bath, New York 14810

Honorable Hugh R. Jones
Court of Appeals Chambers
Oneida City Courthouse
Utica, New York 13501

Honorable Sol Wachtler
Supreme Court Building
Mineola, New York 11501

Honorable Jacob D. Fuchsberg
50th Floor
233 Broadway
New York, New York 10007

Honorable Bernard S. Meyer
Court of Appeals Chambers
36 W. 44th Street
New York, New York 10036

Attorney General for the State of New York
Capitol Building
Albany, New York 12224

Paul S. Edelman

Sworn to before me this
25th day of November, 1980

Notary Public

MARIA ANGRI
Public, State of New York
No. 4723973
Qualified in Kings County
Term Expires March 30, 1982

State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(Seal)

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207
July 14, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

In the Matter of the Application
of FRANCIS GERARD FLEMING
for waiver of strict compliance
with the practice requirement of
22 NYCRR 520.7(a)(2).

Dear Mr. Fleming:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding verified June 30, 1980, has been denied.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

(Retyped for clarity of reproduction)

NEW YORK COURT OF APPEALS

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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

----------x

APPLICATION FOR DETERMINATION REGARDING COMBINED OR CUMULATIVE PRACTICE OF LAW FOR ADMISSION WITHOUT EXAMINATION

TO: NEW YORK COURT OF APPEALS

FRANCIS G. FLEMING, residing at 99 Park Avenue, New York, New York 10016, by virtue of his employment with Kreindler & Kreindler, by the authority of:

a. N.Y. Judiciary Law, §§ 90 and 460 et seq.;

b. The Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 N.Y. Codes, Rules and Regulations, Part 520; and

c. N.Y. Court Rules, New York Supreme Court, Appellate Division, First Department, Part 602

presents this application to the New York Court of Appeals in connection with his petition for admission as an attorney and counselor at law without examination, seeking this Court's determination that applicant's five years of combined or cumulative practice or legal service is the equivalent of actual practice for at least five years in the highest law court or highest court of original jurisdiction in which applicant is admitted.

In support thereof, applicant shows the Court the following:

or cumulative service is the equivalent of actual practice or legal service in the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania,

a. Applicant, Francis G. Fleming, has been admitted to practice in the highest law court of the Commonwealth of Pennsylvania since November 18, 1974 (See Appendix 1 attached to and made a part hereof), and the highest law court of the State of Arizona since December 18, 1975 (See Appendix 2 attached to and made a part hereof); and,

b. While admitted to practice in Pennsylvania and Arizona, applicant has engaged in actual practice or legal service for a period of at least five years in a combination or cumulation of practice or legal service in the following respects:

1. From September 1, 1974 until August 31, 1975, in the federal civilian legal service in a position which requires admission to the Bar for appointment thereto or for performance of the duties thereof, namely, a federal judicial law clerk ; and

2. From September 1, 1975, until the present, in actual practice or legal service the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, the State of Arizona, the Courts of the United States and state and federal agencies, all as more particularly described in the attached supporting affidavits of:

The Honorable Edwin D. Steel, Senior U.S. District Court Judge for the District of Delaware;

Roderick C. McDougall, Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona;

Charles D. Roush, President, Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona; and

Applicant, Francis G. Fleming.

Alternatively, pursuant to Rule 520.9 applicant requests this Court to exercise its discretion to waive strict compliance with the Rules of the Court regarding admission of attorneys without examination for the reason that it would constitute undue hardship to the applicant to require him to submit to a third bar examination in view of the scores attained by applicant in the 1974 and 1975 Multi-State Bar Examinations, and the nature of his legal experience since his initial admission to the Pennsylvania Bar on November 18, 1974 adequately manifests the requisite competence for admission as an attorney and counsellor at law.

A Memorandum of Law in Support of the Application is also submitted for the convenience of this Court.

WHEREFORE, applicant requests this Court to issue its Order determining that applicant's five years of combined a jurisdiction in which applicant has been admitted for at least five years; alternatively, applicant requests this Court to waive strict compliance with the Rules of the Court relating to the admission of attorneys without examination and to issue its order permitting applicant to be admitted without examination on the basis of his previous Multi-

State Bar Examination scores and the nature of his experience since initial admission to the Pennsylvania Bar on November 18, 1974 for the reason that applicant has adequately manifested that he is professionally competent to engage in the practice of law.

This 30 day of June, 1980

Respectfully submitted,

Francis G. Fleming

KREINDLER & KREINDLER

By: Paul S. Edelman
Member of the Firm
99 Park Avenue
New York, N.Y. 10016

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

FRANCIS G. FLEMING, being duly sworn, deposes and says that he is the petitioner in the within application; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to the matters, he believes them to be true.

FRANCIS G. FLEMING

Sworn to before me this
30th day of June, 1980

Notary Public

CHRISTIANE CAURANT
Notary Public, State of New York
No. 41-4643422
Qualified in Queens County
Commission Expires March 30, 1981

NEW YORK COURT OF APPEALS
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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF APPLICANT DESCRIBING FIVE YEARS OF ACTUAL PRACTICE OR LEGAL SERVICE

----------x

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Francis Gerard Fleming, being first duly sworn states and deposes that:

Affiant is the applicant in the above captioned matter.

I was born in New York State on March 15, 1945; I attended elementary school in New York City and a graduated from Xaverian High School, 7100 Shore Road, Brooklyn, New York. In 1962, I commenced college education at Villanova University, Villanova, Pa., and received a Bachelor of Engineering degree in 1967. Following college, I accepted a commission as a Second Lieutenant in the U.S. Marine Corps Reserve in 1967, and was designated a Naval Aviator in 1968. Following service in the Republic of Viet Nam during 1969 and separation from active duty as a Captain in the U.S. Marine Corps Reserve in September of 1971, I graduated from Villanova University School of Law in 1974 and was awarded the Juris Doctor Degree. During law school, I was an Associate Editor for the Villanova Law Review.

Upon completing law school in May of 1974, I applied for and took the bar examination for admission to the Bar of the Supreme Court of the Commonwealth of Pennsylvania. On November 18, 1974, I was duly admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania on the basis of having successfully passed the Pennsylvania

Bar Examination, (see Appendix 1 attached to and made a part hereof) including the 1974 MultiState Bar Examination with a scaled score of 160 (see Appendix 3 attached to amd made apart hereof).

Commencing September 1, 1974, I accepted an appointment as the Judicial Law Clerk of the Honorable Edwin D. Steel, Jr., Senior U.S. District Court Judge for the District of Delaware, a position in Federal legal service which requires admission to the Bar for the appointment thereto or for the performance of the duties thereof as set forth in the affidavit of the Honorable Edwin D. Steel, Jr., Senior U.S. District Court Judge, submitted in support of my application.

Upon the completion of the term of the appointment as the Judicial Law Clerk for Judge Steel on August 31, 1975, I moved to the State of Arizona and commenced employment on or about September 15, 1975, initially as a lawclerk, with the Office of the Attorney General for the State of Arizona in a position which required admission to the Bar, by virtue of my membership in the Pennsylvania Bar, pending publication of the results of the July, 1975 Arizona Bar Examination. Thereafter, on December 18, 1975, I was admitted as a member of the Arizona Bar, (see Appendix 2 attached to and made part hereof) having successfully passed the Multi-State Examination for the second time with a scaled score of 166 (see Appendix 4 attached to and made a part hereof). I actually practiced law in the highest law court or highest court of original jurisdiction in the State of Arizona as an Assistant Attorney General up to and including January 17, 1977, as set forth in the Affidavit of

Roderick G. McDougall submitted in support of my application.

Commencing January 17, 1977, I accepted employment as an Associate Attorney with the law firm Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona 85004. Between January 17, 1977 and May 31, 1979, I actually practiced law in the highest law court or the highest court of original jurisdiction in the State of Arizona, as set forth in the affidavit of Charles D. Roush submitted in support of my application. Briefly described, I actively prepared and litigated three jury trials of at least one week duration, two trials to a trial judge, five appellate matters and numerous motions and shorter judicial appearances during this period. See e.g. Guadalupe Organization et al v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978); Arden Mayfair, Inc v. Ariz. Dept. of Liquor Licenses and Control, 599 P.2d 793 (Ariz. 1979); Combs et al v. Lufkin et al, 598 P.2d 1028 (Ariz. App. 1979).

Commencing June 1, 1979 I accepted employment with the law firm of Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016 as an Associate Attorney. Between June 1, 1979 and the date of submission of this application, I have continued to engage in the actual practice of law in the Courts of the State of Arizona, and in numerous other courts throughout this county by virtue of my admission to the Bars of the State of Arizona and Commonwealth of Pennsylvania. Although my principal offices are located in New York, I have never engaged in the unathorized practice of law in New York State. As an attorney with Kreindler & Kreindler, I have most actively engaged in the litigation

of aircraft accidents involving major U.S. Air Carriers, general aviation aircraft and U.S. Armed Forces military aircraft on a nationwide basis, primarily, in the U.S. District Courts where I have been admitted pro haec vice by virtue of my membership in the Arizona and Pennsylvania Bars.

Specifically, since June 1, 1979, I have been actively engaged on behalf of Kreindler & Kreindler in the preparation of the following cases for trial, none of which are filed in the Courts of the State of New York.

CASE NAME	CASE NUMBER	COURT
Arthur Singer, vs. Grumman Corp. and Grumman Aerospace Corp.	Civil Action #79-C-93	U.S. District Court for the Eastern District of New York
Ilgenfritz vs. Grumman Corp. and Grumman Areospace Corp.	Civil Action #79-C-94	U.S. District Court for the Eastern District of New York
Beamer vs. Grumman Corp. and Grumman Aerospace	Civil Action #79-C-95	U.S. District Court for the Eastern District of New York
Davis vs. Grumman Corp. and Grumman Aerospace Corp.	Civil Action #79-C-96	U.S. District Court for the Eastern District of New York
Calarie vs. United States of America	Civil Action #79-0357-L	U.S. District Court for the Western District of Kentucky
Bigony v. Wright	Civil, Trespass 80-01766	Court of Common Pleas, Montgomery County, State of Pennsylvania
In re: Chicago Air Disaster	MDL # 391	U.S. District Court for the Northern District of Illinois

Of these matters, I have been admitted pro haec vice in the federal courts; and I am admitted in Pennsylvania

and have appeared in Bigony v. Wright on that basis. Although the following is not exhaustive, I have made appearances in these cases as listed:

CASES	CASE NUMBER	DATE	APPEARANCE
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C,	June 29, 1979	Pre-trial Conference before Judge Thomas C. Platt
Singer vs. Grumman	Civil Action 79-93-C	August 21, 1979	Deposition of Morton Shainess
Davis vs. Grumman	Civil Action 79-96-C	August 22, 1979	Deposition of Brenda McMann Davis
Ilgenfritz vs. Grumman	Civil Action 79-94-C	August 23, 1979	Deposition of Cheryl Ilgenfritz
Beamer vs. Grumman	Civil Action 79-95-C	August 24, 1979	Deposition of Karen Ann Ford
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C,	August 29, 1979	Appearance at offices of Mendes & Mount* 3 Park Avenue New York, N.Y.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	August 31, 1979	Appearance at Mendes & Mount* 3 Park Avenue New York, N.Y.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	Sept. 25, 1979	Appearance at th U.S. Naval Air Systems Command, Arlington, Va.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	Sept. 28, 1979	Pre-trial Conference before Judge Thomas C. Platt
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	October 12, 1979	Pre-trial Confrence - before Magistrate Caden

In re Chicago Air Crash Disaster of May 25, 1979	Multi-District Litigation's Panel : 391	March 1, 1980	Plaintiffs' Counsel Committee Pre-Trial Conference, Chicago, Ill.
Calarie v. U.S.	Civil Action 79-0356-L	March 10, 1980	U.S. Dept. of Justice, Production of Documents Washington, D.C.
In re Chicago Air Crash Disaster of May 25, 1979	M.D.L.-#391	March 20, 1980	Pre-trial Conference Chicago, Ill.

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* Regarding production of doucments.

In re Chicago Air Crash Disaster of Ill. May 25, 1979	M.D.L.-#391	April 17, 1980	Pre-trial Conference Chicago,

Additionally, I have spent hundreds of hours on these cases reviewing documents in preparation for the anticipated depositions of the defendants' engineering expert witnesses.

As a result of this intensive preparation, the Grumman cases were recently settled for sums which collectively amount to $1,450,000.00; therefore, they will not be tried. Nevertheless, it is respectfully submitted that these legal services are the equivalent of actual practice in the highest law court or highest court of original jurisduction of the Commonwealth of Pennsylvania, where I have been admitted since November 18, 1974, and the State of Arizona.

Additionally, I have been involved in the prepara-

tion of and the negotiation of several other aviation matters for Kreindler & Kreindler relating to claims which have not as yet been brought to suit. In this capacity, I have attended formal administrative proceedings conducted by the federal agency responsible for investigating aircraft accidents, the National Transportation Safety Board, (N.T.S.B.) in Chicago, Illinois (regarding the McDonald Douglas DC-10 American Airlines crash) and in Cambridge, Massachusetts (regarding the Air New England and Downeast Airlines crashes) on behalf of our clients. I have also participated in the independent review and analysis of numerous evidentiary issues raised at these N.T.S.B. hearings; and, I have prepared claims arising from two other airplane crashes which occured recently near La Guardia Airport (on June 18, 1979 and August 9, 1979 respectively) with respect to legal questions of liability and damages for the purpose of presenting and pursuing claims for damages on behalf of occupants' survivors. Thus, I have also been practicing law in a manner equivalent to actual practice in the Commonwealth of Pennsylvania during the last several months by preparing aviation accidents claims for possible settlement without initiating a lawsuit.

Furthermore, since June 1979, although located in New York, I have continued to practice law actively in Arizona. I have formed and maintain a professional corporation within the State of Arizona, and I continue to represent Arizona residents in litigation pending in the Arizona Court of Appeals, Division I, the Maricopa County Superior Court, the U.S. Court of Claims, and in other respects. For example, I am the attorney of record in:

CASE NAME	CASE NUMBER	COURT
Kinzley vs. United States of America,	Petition #503-79C	United States Court of Claims
Northeast Phoenix Homeowners' Association, et al. vs. Scottsdale Municipal Airport et al.	1CA CIV 4686	Arizona Court of Appeals, Division 1

Moreover, I have been involved in the day to day prosecution of these matters.

I have recently filed a Reply Brief in the appeal Northeast Phoenix Homeowners' Association, et al v. City of Scottsdale, 1 CA-CIV. 4686 (July 31, 1979), and I recently filed a petition in the U.S. Court of Claims initiating an action for breach of contract against the United States. I have also responded to a motion to stay the proceedings in the Court of Claims matter and will continue to prepare this case and eventually try it. I have also instituted an action to Probate a will in Maricopa County Superior Court, Phoenix, Arizona and prepared and initiated an administrative application for Workmen's Compensation benefits in Arizona.

In summary, while admitted to the Bar of the Commonweath of Pennsylvania for at least five years, I believe that I have been actively engaged in the practice of law, although not entirely before Pennsylvania Courts, in a combination or cumulation of practice or legal service in the Federal civilian legal service as a federal judicial lawclerk, and in the Arizona, Pennsylvania and federal courts and agencies as an Assistant Attorney General for the State of Arizona, and as an attorney in a private practice employed by two distinguished law firms and individually. I submit that this practice or legal service is the equivalent of five years of actual practice in the highest law court or

highest court of original jurisdiction of the Commonwealth of Pennsylvania and request this Court's formal determination to that effect.

Francis G. Fleming

Sworn to before me this
day of 20th of June, 1980

Sonia Aguirre
Notary Public

SONIA AGUIRRE
Notary Public, State of New York
No. 01A4956610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires Mar. 30, 1982

NEW YORK COURT OF APPEALS
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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF FEDERAL LEGAL SERVICE SEPT., 1974 - Aug., 1975

----------x

STATE OF DELAWARE)
) ss.:
COUNTY OF NEW CASTLE)

Edwin D. Steel, Jr., being duly first sworn deposes and says that:

Affiant is a Senior United States District Court Judge, United States District Court for the District of Delaware.

During the period September 1, 1974 through August 31, 1975, following graduation from law school, applicant, Francis G. Fleming, was employed in the capacity of my judicial law clerk.

The position of U.S. District Court judicial law-clerk requires admission to the Bar for the performance of its duties, and applicant, Francis G. Fleming, was admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania on November 18, 1974.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and New York Supreme Court, Appellate Division, First Judicial Department, for admission to the practice of law as an Attorney and Counselor and member of the Bar of the New York State.

Edwin D. Steel, Jr.

Sworn to before me this 27th day of May, 1981

Notary Public

NEW YORK COURT OF APPEALS
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In the Matter of the Application
for Admission to the Bar of
FRANCIS GERARD FLEMING

AFFIDAVIT OF STATE LEGAL SERVICE AND ACTUAL PRACTICE SEPT., 1975-JAN., 1977

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STATE OF Arizona)
)ss.:
COUNTY OF Maricopa)

Roderick G. McDougall, being duly first sworn deposes and says that:

Affiant is the Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona.

On or about September 15, 1975, applicant, Francis G. Fleming, commenced employment in the Office of the Attorney General for the State of Arizona as a lawclerk until December 18, 1975 by virtue of his admission to the Bar of the Supreme Court of Pennsylvania.

On December 18, 1975, applicant, Francis G. Fleming was admitted to the Bar of the Supreme Court of the State of Arizona, and actually practiced law as an Assistant Attorney General for the Office of the Attorney General for the State of Arizona in the highest law court or highest court of original jurisdiction in the State of Arizona until January 15, 1977.

Between September 15, 1975 and January 15, 1977, applicant, Francis G. Fleming participated in numerous judicial and administrative proceedings on behalf of the State of Arizona, including matters in the Supreme Court of the State of Arizona, the U.S. Court of Appeals for the Ninth Circuit, and the Maricopa County Superior Court; this

participation included writing appellate briefs, preparing for and responding to motions in court and trial of summary proceedings; applicant, Francis G. Fleming also acted as an attorney on behalf of more than 15 Executive Agencies of the State of Arizona in administrative proceedings and at formal meetings.

Additionally, between September 15, 1975 and January 15, 1977, applicant, Francis G. Fleming actively engaged in the discovery phases of numerous other litigation matters, including participating in the preparation and answering of interrogatories and requests for the production of documents, interviewing and preparing witnesses, taking and attending depositions; additionally applicant engaged in intensive legal research and writing leading to the issuance of formal legal opinions of the Office of the Attorney General for State of Arizona and he engaged in the review and negotiation of contracts involving the State of Arizona.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and the New York Supreme Court, Appellate Division, First Judicial Department for admission to the practice of law as an Attorney and Counselor and member of the Bar of New York State.

Roderick G. McDougall

Sworn to before me this
24th day of January, 1980.

Notary Public

My Commission Expires May 4, 1983

NEW YORK COURT OF APPEALS

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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF ACTUAL PRACTICE JAN., 1977-JUNE, 1979

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STATE OF ARIZONA)
) ss.:
COUNTY OF MARICOPA)

Charles D. Roush, being duly first sworn deposes and says that:

Affiant is President of the law firm Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona.

On January 17, 1977, applicant Francis G. Fleming, commenced employment with the law firm Treon, Warnicke, Dann & Roush, P.A. as an Associate Attorney and actually practiced law with this law firm as a member of the Bar of the Supreme Court of Arizona in the highest law court or highest court of original jurisdiction of the State of Arizona from January 17, 1977 to May 31, 1979.

From January 17, 1977 to May 31, 1979, applicant, Francis G. Fleming, participated in numerous judicial and administrative proceedings as an attorney of this firm in the Supreme Court of the State of Arizona, the Arizona

Court of Appeals, the U.S. Court of Appeals for the Fourth Circuit, the Maricopa County Superior Court, the Pinal County Superior Court, the U.S. District Court for the District of Arizona, the Arizona State Liquor Board, the City Council of the City of Phoenix and the City Council of the City of Scottsdale.

As an Associate Attorney with this firm, applicant, Francis G. Fleming, conducted the examination of witnesses and participated in the argument of the law and facts in the trial of at least five major cases; applicant also wrote Appellate Briefs and appeared in the Appellate Courts of this state for oral argument in at least three appellate matters and he contributed significantly to the Appellate Brief in at least one appellate matter in the U.S. Court of Appeals for the Fourth Circuit.

In addition to the actual participation in the trial and appeal of matters in which this firm has been involved, applicant, Francis G. Fleming extensively engaged in the discovery phases of numerous other matters, including participating in the preparation of and answering of interrogatories and requests for the production of documents, interviewing and preparing witnesses, and taking and attending depositions; applicant has also participated in other types of court proceedings, including motions and summary proceedings; applicant has also been actively engaged in the successful negotiation and settlement of matters which were amicably resolved by agreement.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and the New York Supreme

Court, Appellate Division, First Judicial Department for Admission to the practice of law as an Attorney or Counselor and member of the Bar of New York State.

Charles D. Roush

Sworn to before me this
21st day of January, 1980.

Notary Public

My Commission Expires:
January 18, 1984.

Supreme Court of Pennsylvania

know all men by these presents,

That FRANCIS GERARD FLEMING

was duly admitted to the Bar of the Commonwealth of Pennsylvania on the 18th day of November 19 74, and is now a qualified member in good standing.

Witness my hand and official seal
this 6th day
of February A.D. 19 80

Sally Ann Wise
Prothonotary

CERTIFICATE OF THE CLERK OF THE SUPREME COURT
OF THE
STATE OF ARIZONA

I, MARYANN HOPKINS-YOUNG, *Clerk of the Supreme Court of the State of Arizona, hereby certify that, according to the records of my office*

FRANCIS GERARD FLEMING

was on the 18th *day of* December, 1975 *duly admitted to practice as an Attorney and Counsellor at Law in all the courts of Arizona; that he has never been disbarred or suspended; that no disciplinary proceedings are pending against him; and that his name now appears on the Roll of Attorneys in this office as a member of the bar in good standing.*

Given under my hand and the seal of said Court this 4th *day of* February, 1980

MARYANN HOPKINS-YOUNG
CLERK

By Teresa Sanchez
DEPUTY

PENNSYLVANIA BOARD OF LAW EXAMINERS
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Philadelphia, Pennsylvania 19102
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secretary and treasurer

November 26, 1979

Francis G. Fleming, Esquire
123 Hamilton Avenue
Glen Rock, N.J. 07452

Dear Mr. Fleming:

Pursuant to your request, this is to advise you that you sat for the Pennsylvania bar examination on July 31 & August 1, 1974 and received a scaled multistate score of 160.

Very truly yours,

Susan L. Anderson

SUSAN L. ANDERSON
Secretary

SLA: gm

COMMITTEE ON EXAMINATIONS
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COOLIDGE

December 7, 1979

Mr. Francis G. Fleming
123 Hamilton Avenue
Glen Rock, New Jersey 07452

Dear Mr. Fleming:

Pursuant to your request of November 14, we wish to advise that you received the following scores on the multistate bar examination which you wrote in July 1975 in Arizona:

Scale score - 166
Raw score - - 159

We regret the delay in sending this information to you, but the files for this year are in storage and it took some time to locate the information.

Very truly yours,

Doris Odom

Mrs. Doris Odom
Secretary

dvo

National Conference of Bar Examiners
BAR EXAMINATION COMMITTEE
Tate Hall Columbia, Missouri 65211 - Tel. (314) 882-7562
Joe E. Covington, Director of Testing

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Douglas D. Roche — Detroit, Mich.
Ex officio:
George T. Barrow — Houston, Tex.

January 23, 1980

Francis G. Fleming, Esq.
99 Park Avenue
26th Floor
New York, New York 10016

Dear Mr. Fleming:

In your recent letter you inquire about the acceptance of an MBE score made on an examination administered in another jurisdiction.

Two MBE scores are reported to the board of bar examiners in the jurisdiction where an applicant takes the MBE. One score is the raw score or the number of correct answers. The second is known as a scaled score, which is a statistically adjusted score based on the level of difficulty of this particular form of the MBE as compared to the standard that was established about seven years ago. This means the scaled score is intended to represent the same level of competence of the applicants from test to test. Everything else being equal, the applicant should make the same or almost the same score if he takes a new form of the test. That your scaled scores are 160 and 166 is an indication that this theory is correct.

There are eighteen jurisdictions which accept the transfer of MBE scores from another jurisdiction. They are: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Idaho, Illinois, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, South Dakota, Virginia, Wisconsin and Wyoming. States usually have some limitation, such as the two year limitation of New Jersey or the twenty-one month limitation of California.

Since the National Conference of Bar Examiners leaves such decisions up to the states, we take no position on the matter of transfer, but we do believe that a state is justified in accepting a transferred score.

I hope this will be of some assistance to you.

Sincerely yours,

Joe E. Covington
Director of Testing

JEC:bas

520.7 Admission without examination. (a) *General.* In its discretion the Appellate Division may admit to practice without examination an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor at law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and

(2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:

(*a*) in its highest law court or highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or

(*b*) in Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(*c*) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(*d*) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (*a*) of this subparagraph; or

(ii) is a graduate of and has received a first degree in law from an approved law school as defined in section 520.3(b) of this Part and, for a period of at least five years immediately preceding the application for admission without examination, has been employed in this State or in any other state or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor or associate professor; and

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age.

(b) *Proof required.* An applicant for admission under this section shall file with the Clerk of the Appellate Division of the department in which the applicant resides or is employed full-time, or if the applicant does not reside and is not employed full-time in the State, with the Clerk of the Appellate Division of the Third Department:

(1) a certificate from the clerk of the highest court of the state, territory, district or foreign country in which applicant has been admitted to practice as an attorney and counselor at law or the equivalent, certifying to applicant's admission to practice and the date thereof; and

(2) in the case of an applicant seeking admission under subparagraph (a)(2)(ii) of this section:

(i) a certificate from the dean of the law school which employs or employed the applicant, certifying to the nature and extent of applicant's employment and the rank attained; and

(ii) a certificate from an approved law school as defined in section 520.3(b) of this Part, certifying to applicant's graduation and receipt of a first degree in law; and

(3) a certificate from the New York State Board of Law Examiners certifying that the applicant has shown, by satisfactory proof submitted to it that applicant has had the substantial equivalent of the legal education required by paragraph (3) of subdivision (a) of this section; and

(4) a report of the National Conference of Bar Examiners together with such other satisfactory evidence of character and qualifications as may be required.

(c) *Proof to be submitted and fee to be paid to New York State Board of Law Examiners.* The applicant shall submit to the New York State Board of Law Examiners such proof of compliance with the provisions of paragraph (3) of subdivision (a) of this section as the board may require and shall at the same time pay the board a fee of $100 by certified check or money order payable to the order of the board.

(d) *Discretion of Appellate Division.* The Appellate Division may in its discretion impose as a condition to admission such other tests of character and fitness as it may deem proper.

(e) *Admission pro hac vice.* An attorney and counselor at law or the equivalent from another state, territory, district or foreign country may, in the discretion of any court of record, be admitted *pro hac vice:*

(1) to participate in the trial or argument of any particular cause in which the attorney may be for the time being employed; or

(2) to advise and represent clients or participate in the trial or argument of any case, during the continuance of applicant's enrollment as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law; or

(3) provided applicant is a graduate of an approved law school, to advise and represent clients and participate in the trial or argument of any case during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law, but in no event for longer than 18 months.

520.10 Application for waiver of rules. The Court of Appeals, upon application, may in its discretion vary the application of or waive any provision of these rules where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

520.7 Admission without examination*****

(e) *Admission pro hac vice.* An attorney and counselor at law or the equivalent from another state, territory, district or foreign country may be admitted *pro hac vice:*

(1) in the discretion of any court of record, to participate in the trial or argument of any particular cause in which the attorney may be for the time being employed; or

(2) in the discretion of the Appellate Division, to advise and represent clients or participate in the trial or argument of any case, during the continuance of applicant's enrollment in an approved law school in New York State as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel, or the Attorney General; or

(3) in the discretion of the Appellate Division, provided applicant is a graduate of an approved law school, to advise and represent clients and participate in the trial or argument of any case during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel, or the Attorney General, but in no event for longer than 18 months.